



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. APPLICATION NO. 35 OF 2017

JOSEPHAT MUTEMBEIAPPLICANT/1ST DEFENDANT

VERSUS

**JAPHET KIBUNJA MAGAMBO & ALEX N MANYARA (Suing as the legal
representative of the deceased Peter Kiamthi).....PLAINTIFF/RESPONDENT**

IRUKI NAFTALY.....2ND DEFENDANT/RESPONDENT

RULING

Josephat Mutembei filed application dated 15th June 2017 seeking the court to enlarge/ extend time within which to file and serve a memorandum of Appeal out of the prescribed time;

- **That** the 1st defendant/Applicant draft Memorandum of Appeal annexed deemed properly filed and served upon payment of court filing fees.
- **That** the court be pleased to order stay of execution and all consequential orders arising there from pending the hearing and determination of application and intended appeal.

The application was supported by the grounds on face of the application and affidavit of Josephat Mutembei sworn on 15th June 2017.

Judgment in Nkubu PMCC NO. 33 of 2015 was delivered on 10th May 2017 in favour of the Respondent. The applicant averred that his advocate wrote informing him of the outcome of the judgment and tried to contact him but didn't reach through.

That it was only on 8th April 2017 that he contacted his advocates and conveyed his dissatisfaction with the judgment and gave instructions to appeal.

That when a clerk by the name Paul Biage Motanya went to the High Court at Meru to file appeal, he was advised that Memorandum of Appeal must be accompanied with a decree.

That when proceedings were applied for payments could not be effected as receipt books had run out. As a result time for filing appeal lapsed before appeal could be filed.

That delay was not deliberate nor inordinate. The applicant averred that there is a high probable likelihood that execution may issue at any time if the orders sought are not granted. He argued that his appeal raises triable issues and should be allowed to file the intended appeal.

It was averred that the applicant was ready to deposit half the decretal sum as security in court or in the joint account in the name of both advocates.

That he was apprehensive that the Respondent is not a person of means and may not be able to refund the decretal sums should the filed appeal succeed.

It was averred that no prejudice shall be visited upon the plaintiff/Respondent if the orders sought are granted.

The 1st Respondent filed grounds of opposition and among others said that no application for proceedings was made to the trial court and therefore the applicant cannot complain of not getting a typed copy of judgment in time.

It was argued that there were no grounds made out for stay and that application to file appeal out of time is misconceived.

According to paragraph 2 of the supporting affidavit judgement was delivered on 10.5.2017 and in paragraph 5 of the same supporting affidavit judgement was delivered on 8.04.2017. The copy of the judgement was not annexed for the court to ascertain the exact date when the judgement was delivered.

The letter dated 9.6.2017 requests for supply of proceedings. But same is not stamped as received by the court.

- The clerk who is alleged to have visited the registry has not sworn an affidavit to confirm that he was told receipts had run out.
- Receipts are issued against bank deposit slips for fees paid in the bank and none has been shown.

The Trial Magistrate made an award of Kshs 1,000,000/= as global general damages and Kshs 52520/= as special damages:

The applicant didn't annex a copy of the Lower court judgment and submissions in the application to enable the court to look at it and consider whether the application for stay was valid.

The grounds upon which grant for stay of execution are to be made are:

- Proof of substantial loss
- Proof that there is no inordinate delay
- Proof that the intended appeal has huge chances of success
- An undertaking for security
- There must be a positive order that being sought to be stayed

From the letter dated 11th May 2017 by M/s Mose, Mose & Millimo Advocates to the applicant Josephat Mutembei it appears there was consent on liability in ratio of 90:10 in favour of the Respondent herein. That being the case the applicant ought to have attached his submissions in the lower court to demonstrate how much of the 90% he was willing to pay in damages after admitting liability. Without the lower court file and/or certified copy of the judgement this court would not be able to ascertain reasonable portion of the decretal sum that it would impose on the applicant to deposit. In the circumstances, being the applicant is ready to deposit security in court it is ordered that the entire decretal sum of Kshs 1,505,268/= be deposited in an interest earning account within 14 days from today's date. The applicant is given leave to file appeal out of time within 14 days. Failure to comply with the above two conditions the Respondent can proceed and execute the decree in Nkubu PMCC No.33 of 2015 without recourse to the court. Cost of the application to Respondent.

Ruling Signed, Delivered and Dated this 21st Day of September 2017.

HON. A. ONG'INJO

JUDGE

In the presence of:

C/A : Penina

Applicant: Mr Ojiambo Advocate Holding Brief for M/s Mose, Mose & Millimo Advocate for Applicant.

Respondent:-Mr Kimathi Advocate for Munene for Respondent.

HON. A. ONG'INJO

JUDGE

Mr Ojiambo

We wish to be supplied with copy of ruling.

Order

Copy of ruling to be supplied upon payment of copying charges

HON. A. ONG'INJO JUDGE

21.9.2017